



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 12, 2015

Michael S. Frank
City Manager
City of Novato
922 Machin Avenue
Novato, CA 94945

Re: Your Request for Advice
Our File No. A-15-076

Dear Mr. Frank:

This letter responds to your request for advice on behalf of Novato City Council regarding the provisions of the Political Reform Act¹ (the “Act”) pertaining to Conflict of Interest disclosure and Conflict of Interest Codes.

Please note that we are only providing advice under the provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

1. Is the test to determine whether an agency is decision-making or advisory predicated solely upon an examination of the duties assigned to it, or does the agency instead look to its actual function and operations?
2. Should the members of the Economic Development Advisory Committee (“EDAC”) be included in the City’s Conflict of Interest Code as designated officials and thus required to submit Annual Statements of Economic Interest?

CONCLUSION

1. Regulation 18700 provides three alternative standards to determine if an agency is a decision-making body. The first two standards are based on the powers/duties given to the body, whether the powers have been exercised yet or not. However, if the agency does not qualify as a decision-making body under either of these two tests, the third standard is applied. The third standard considers the actual track record of the body.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. The EDAC is currently considered an advisory body and the members are not considered public officials under the Act. Thus, the members need not be included in the City's Conflict of Interest Code and are not required to submit Annual Statements of Economic Interest.

FACTS

By City Council Resolution, the Novato City Council re-established the EDAC. City Council Resolution No. 71-07 provides that the EDAC "shall be advisory" to the City Council and "shall develop recommendations" on implementing various policies, programs and goals set forth in a portion of the City's General Plan. Resolution No. 71-07 also requires that EDAC performs specific duties.

1. Take specific or concrete steps to foster public-private partnerships and initiatives to implement specific programs in the Economic Development Master Plan.
2. Conduct a study to develop the profile of small Novato businesses and identify factors encouraging small businesses to locate in Novato.
3. Prepare an annual local report to the City Council on the progress made in implementing a sustainable economy, including job creation, and economic development activities. These activities are done by City staff during the budget process.
4. Undertake concrete or specific steps to encourage employers to advertise locally for new job opportunities.
5. Sponsor local job, trade or business fairs.
6. Target small businesses and promotional economic programs.
7. Assist in promotional marketing programs or tours for targeted businesses.
8. Work with the Mann County Economic Development Commission in educational, informational and development activities.
9. Assist in establishing educational programs for Novato businesses on profiting from sustainable environmental business practices.

You also stated the following:

- Although the original conceptual framework out of which the EDAC arose and is embodied in Resolution No. 71-07 included tasking the EDAC with the responsibilities listed in Resolution No. 71-07, you stated that the EDAC has not actually performed most of these responsibilities. For example, the EDAC has not created an Economic Development Master Plan. Rather, it did prepare an Economic Development Strategy in 2005 which it submitted to the Council for its consideration. The Council agreed to receive the Economic

Development Strategy but deferred implementing any of its recommendations to a later time.

- You also stated that the City's records do not reflect that any of the recommendations proposed in the Economic Development Strategy were brought back to the Council for consideration or adoption. For at least the past six years, the City's goals and objectives for Economic Development programs have been discussed and blessed by the Commission, but then those are incorporated into a larger citywide Council strategic planning process.
- Notwithstanding the seemingly broad sweep of duties that Resolution No. 71-07 charges the EDAC with performing, in practice as well as in said Resolution itself, the EDAC acts only in an advisory capacity to City staff and the City Council on policies, programs and initiatives. The EDAC does not review, give input, or recommend City approval of any specific real estate project or development proposal. The EDAC has provided and does provide advisory input to staff and Council on General Plan updates to encourage the Council to include in the General Plan policies and programs supporting high quality and appropriate commercial retail development in specific areas throughout the City.
- The EDAC does not develop, sponsor, assist or work on behalf of the City with other organizations or by itself to implement any economic development programs or initiatives. The EDAC acts only in an advisory capacity on economic development policies, programs, and initiatives recommended by City staff. The EDAC does not possess the authority to act independently of the City Council or City Manager. In the last three or four years, the EDAC has never been requested to or authorized to oversee or be involved with implementing any economic development policies, initiatives or programs.

ANALYSIS

1. Is the test to determine whether an agency is decision-making or advisory predicated solely upon an examination of the duties assigned to it, or does the agency look instead at its actual function and operations?

The Act requires that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) The Act prevents conflicts of interest in two ways: by requiring officials with a conflict of interest to disqualify from decisions in which they have the conflict (Sections 87100 et seq.) and by requiring disclosure of interests that may result in a conflict on an annual basis. (Sections 87100-87350.) The threshold question to determine if the members of the EDAC are subject to the Act's disclosure and disqualification provisions is whether the members are "public officials."

For purposes of the Act, Section 82048 defines "public official" as every member, officer, employee or consultant of a state or local government agency. The term is further defined by Regulation 18700, which states that for purposes of the Act's conflict of interest rules, members of committee, board, commission, group are considered public officials only if they have decision-

making authority. Regulation 18700(c)(2)(A) clarifies that a committee, board, commission, group, or other body possesses decision-making authority if any of the following apply:

- *It may make a final governmental decision.*

Thus, if EDAC may make a final governmental decision (even if it has not yet done so) the members are public officials.

- *It may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden.*

Similarly, if EDAC may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden, the members would be public officials. This would be true even if they have not actually exercised the power.

- *It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.*

Under this criteria, relevant only if the prior two standards are not met, the test focuses on the actual practice rather than the board's stated powers. If the EDAC's recommendations are "rubber stamped" over an extended period of time, the members are public officials.

2. Should the members of the EDAC be included in the City's Conflict of Interest Code as designated officials and thus required to submit Annual Statements of Economic Interest?

Based upon the facts provided, the EDAC was established and imbued with a variety of powers that they have yet to exercise. However, as discussed above, if the EDAC has the power to make a final governmental decision or it may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden, the EDAC would be a decision-making body whether the power had been exercised or not.

- The EDAC is charged with conducting a study to develop the profile of small Novato businesses and identify factors encouraging small businesses to locate in Novato and to prepare an annual local report to the City Council on the progress made in implementing a sustainable economy, including job creation, and economic development activities. However, Regulation 18700(c)(2)(B) provides that a committee, board, commission, group, or other body that merely researches a topic and prepares a report or recommendation for submission to another public official or governmental agency that has final decision-making authority does not possess decision-making authority itself.
- The EDAC does not review, give input or recommend City approval of any specific real estate project or development proposal.

- The EDAC provides advisory input to staff and Council on General Plan updates to encourage the Council to include in the General Plan policies and programs supporting high quality and appropriate commercial retail development in specific areas throughout the City.
- The EDAC does not possess the authority to act independently of the City Council or City Manager.

We agree that the EDAC appears to have no power to make a final governmental decision or compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden. Rather, the EDAC acts only in an advisory capacity on economic development policies, programs and initiatives recommended by City staff.

Moreover, you stated that the EDAC has not made substantive recommendations that, over an extended period of time, the city council has regularly approved without significant amendment or modification. You stated that the City's records do not reflect that any of the recommendations proposed in the Economic Development Strategy were brought back to the Council to consider or adopt. Since your tenure with the City (6 years), you stated that the goals and objectives of the Economic Development program of the City have been discussed and blessed by the Commission, but then those are incorporated into a larger citywide Council strategic planning process. Thus, the EDAC's members do not qualify as public officials under the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel
Legal Division

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